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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 334

ROBERT E. BOEHKER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

ROBERT E. BOENKER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio, entered in this cause of April 16, 1969, affirming his conviction of second degree manslaughter.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Court of Appeals of the Eighth Judicial District of Ohio (Cuyahoga County) is unreported and is printed in the Appendix, *infra,* pp. 9-12.

An appeal was attempted to the Supreme Court of the State of Ohio, said appeal was dismissed sua sponte on March 12, 1969. A copy of that order is printed in the Appendix, *infra,* p. 12.

JURISDICTION.

A motion for rehearing on the dismissal of appeal was duly filed, but denied by the Supreme Court of the State of Ohio on April 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. Where a written statement made by the accused is elicited after probable cause for arrest existed even though there is no formal arrest and prior to the delineation of safeguards to the accused, should such statement be suppressed in State Criminal proceedings as violative of the Fifth and Fourteenth Amendments to the United States Constitution?

II. Where the trial court charges a jury regarding an offense not mentioned in either the original indictment or subsequent Bill of Particulars should such charge be found to be reversible error in State criminal proceedings as violative of the Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment XIV, Section 1, Clause 2:

> * * * nor shall any state deprive any person of life, liberty, or property without due process of law: * * *

Fifth Amendment to the Constitution of the United States (Rights of Persons):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States (Rights of Accused):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Ohio Constitution—Article I—Section 10.

> Except in cases of impeachment, cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to accused means and the opportunity to be present in person and with counsel at the taking of

such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

The full text of each of Ohio Revised Code Sections is reprinted in Appendix, *infra*, pp. 12-13.

STATEMENT.

Petitioner was indicted, tried and convicted of second degree manslaughter (traffic manslaughter) pursuant to Ohio Revised Code Section 4511.18 in the Common Pleas Court of Cuyahoga County.

At the commencement of the trial, it was stipulated by both prosecution and defense counsel that the victim, one John Perry Papp, age 6, died as the result of an automobile pedestrian collision in Lakewood, Ohio, at or about 6:30 P.M., February 18, 1966; the automobile was driven by petitioner.

The prosecution's evidence included testimony by the officer investigating the accident as to what the petitioner said when the officer asked him what happened and the statement that the petitioner wrote out in the police cruiser a few moments afterwards. Before the actual trial, the court conducted a hearing on the motion by petitioner to suppress all written and oral statements given by the petitioner to the police. The trial court overruled the petitioner's motion as to the oral and written statements made by him at the scene, holding that the statements come within the lawful and admissible scope and field of interrogation. A written statement made by petitioner at

the Lakewood, Ohio police station the following day was not admissible according to the trial court.

In the trial court's charge to the jury, the court gave to the jury law which was not included in the State's Bill of Particulars. (The series of motions and responses thereto on bills of particulars are found in the appendix, pp. 14-17.)

REASONS FOR GRANTING WRIT.

I. STATEMENTS TAKEN WITHOUT DUE WARNING OF CONSTITUTIONAL GUARANTEES VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner stands convicted of traffic manslaughter under Ohio Revised Code Sections 4511.20, 4511.21 and 4511.46. Petitioner stands convicted due to the use of statements which were given prior to his being informed of his right to the assistance of counsel and the right not to be compelled to be a witness against himself. It is axiomatic under our system of criminal jurisprudence that an accusatorial system is one in which the prosecution must establish a defendant's guilt by evidence not by coercive statements.

This Court has established judicious rules whereby a pre-trial statement given by accused can not be used against him if he has not first been advised of his right to counsel, retained or appointed, that he has an absolute right to remain silent and that anything he says may be used against him. *Escobedo v. Illinois*, 378 U. S. 478 (1964); *Miranda v. Arizona*, 384 U. S. 436 (1966).

Miranda describes custodial interrogation as questioning initiated by the police after the accused has been taken into custody or otherwise deprived of his freedom of action.

When custodial interrogation begins must be determined by the facts in each case. In order to effectuate the police of *Miranda,* the Court must, as dictated by the *Escobedo* case, provide assistance to the accused at "the critical stage." The Court in *Miranda* incorporated this philosophy in its decision. The critical stage has been declared to be that point "where the police officer during his investigation has enough information for probable cause to arrest." *State v. Taylor,* 437 P. 2d 853 (1964). It is at this point that the officers' solicitations turn from a general inquiry into an unsolved crime, to an elicitation of evidence to secure a conviction. *State v. Intogna,* 419 P. 2d 59 (1962); *State v. Tellez,* 431 P. 2d 691 (1966).

In the case at bar the officer knew the defendant was driving the automobile and had enough evidence to arrest the defendant. Yet he continued his questioning. This questioning was not in the furtherance of a general inquiry into an unsolved crime. The focus was now on the accused and the questioning was to elicit evidence.

The philosophy of the *Miranda* decision to prohibit inherently coercive questioning would be circumvented if the police were allowed to substitute the secluded patrol car for the stationhouse. Formal arrest is not the proper point to attach the *Miranda* warnings. If this were so the police would circumvent *Miranda* by delaying the "formal" arrest.

It is contended that the focus in this case was on the accused, he was not given his constitutional rights, and the defendant was denied a fair trial because of the use of coerced statements. This Court must determine the controversial issue of when custodial interrogation attaches.

II. PETITIONER'S CONVICTION ON CHARGES NOT INCLUDED IN THE INDICTMENT VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

It is provided in the Constitution, Ohio Constitution Article I, Section 10, United States Constitution, Sixth Amendment, that the accused is guaranteed the right to be apprised of the exact charge or charges against him. Traditionally this was accomplished by service of notice of the indictment.

The prosecution is limited in its proof to the crime charged in the indictment as made definite in the Bill of Particulars.

The indictment in this case merely charged that the defendant, on or about February 18, 1966, unintentionally and unlawfully killed John Perry Papp while engaged in the violation of State Traffic Law R.C. 4511.20, R.C. 4511.21, R.C. 4511.46. Counsel for defense requested and was granted a Bill of Particulars. In the Amended Bill of Particulars, the prosecuting attorney specifically stated that the charge against the defendant was limited to the issue of excessive speed and to that portion of R.C. 4511.21 dealing with speed limits. No mention was made of the assured clear distance during the trial. Although timely objection was made by defense counsel the court below charged the jury that:

> "Section 4511.21 which I referred to which is the unlawful operation which the state has charged, refers generally to assured clear distance and speed limits.
>
> This is the particular reference to assured clear distance: 'No motorist shall operate a vehicle at a greater speed than will permit him to bring it to a complete stop within the assured clear distance between the car he is operating and a visible object in its path of travel.'

> As the motorist proceeds, the assured clear distance constantly changes. It is measured at any moment by the distance between the motorist's car and the visible object ahead in the same lane in which the motorist is proceeding."

Because of this charge the State was allowed to establish its case against the defendant by proving an offense which the defendant was never confronted with. The State is limited in its proof to what is specified in the indictment and made definite by the Bill of Particulars; petitioner's conviction is based upon proof not elicited in the indictment.

CONCLUSION.

This case arises out of ugly beginnings,—a brutal death of a six year old pedestrian. However it is such cases as this that constitutional protections must be interposed.

The State of Ohio, through its judicial processes, has sanctioned the conviction of petitioner without delving into important constitutional problems. Grant of certiorari in the instant case will give this Court an opportunity to further delineate the moment when constitutional warnings must be given to an accused and restrictions as to proof to convict.

For the foregoing reasons, this petition for a writ of certiorari shall be granted.

Respectfully submitted,

HARVEY H. STARKOFF,
Counsel for Petitioner.

APPENDIX.

MEMORANDUM TO LAWYERS, COURT OF APPEALS OF CUYAHOGA COUNTY.

(October 31, 1968.)

This appeal was brought to this court by the defendant, Robert E. Boenker, following his conviction for second degree manslaughter in the Court of Common Pleas. The case arose out of an automobile-pedestrian accident in which the defendant, Robert E. Boenker, hit and killed John Perry Papp, a six year old pedestrian standing in an intersection in Lakewood.

The grand jury returned an indictment for second degree manslaughter, charging that the defendant violated Revised Code Section 4511.20, 4511.21 and 4511.46. Section 4511.20, Revised Code, pertains to the reckless operation of vehicles; Section 4511.46, Revised Code, pertains to the right of way of pedestrians crossing at a crosswalk. Section 4511.21, Revised Code, contains three sections; the first of which pertains to the reasonable and proper speed of an automobile in relation to the driving conditions; the second of which pertains to the speed that will allow stoppage within the assured clear distance ahead and the third sets the prima-facie speed limits for various traffic areas.

Following the indictment the defendant asked for and received a Bill of Particulars in which the prosecutor stated that at the time of the accident the defendant was driving "at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk * * *." The defendant then asked for a more complete Bill of Particulars, and the prosecution responded with essentially the same statement with the inclusion of the exact location of the accident. The de-

fendant again requested a more complete bill; however, this motion was denied by Judge McMahon.

The allegations arising from the indictment concerning violations of Section 4511.20, Revised Code, reckless driving, and Section 4511.46, Revised Code, right of way for a pedestrian, were dropped. Evidence was presented as to the location of the pedestrians at the time of impact and as to the speed that defendant had been driving. At the end of the trial, Judge Whiting charged the jury as to all three portions of Section 4511.21, Revised Code, including assured clear distance ahead.

Following the charge to the jury, the defendant took exception to that portion of the charge involving assured clear distance, contending that "the state is limited in its proof to what is specified in the indictment and made definite by the Bill of Particulars," and that since no mention of this portion of the statute was made in the indictment, or in the Bill of Particulars, or in the entire trial, the judge should have been precluded from charging the jury on it.

The essential issue of this appeal thus centers on whether or not the indictment as clarified by the Bills of Particulars did, as a matter of law, limit the state's case to the extent that the judge was prohibited from charging the jury on the assured clear distance ahead portion of Section 4511.21, Revised Code.

It is quite clear that the indictment alone made sufficient reference to the entire statute so that at no time during the trial would the state have gone outside the indictment in referring to either portion. The crux of the issue lies in whether or not the Bills of Particulars limited the indictment to only the first portion and third portion of the statute thus precluding the state from alluding to the second portion.

Two general principles that have been clearly established by the courts concerning Bills of Particulars are applicable to the instant case. It has been made clear by the courts that the function or purpose of a Bill of Particulars in criminal cases "is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial." *United States v. U. S. Gypsum Co.*, D. C. Dist. Col. 37 F. Supp. 398 (1941). It is also clear that the state is confined at trial to the items listed in the Bill of Particulars. *State v. Bernstein*, 25 Ohio Law Abstract 291, 305; 8th Dist. Ct. of Appeals (1937); 71 *C.J.S.* 1096.

While in the instant case it is apparent that the defense counsel was surprised by and unprepared for Judge Whiting's charge on the assured clear distance ahead portion of the statute (R. 455), it also is clear that such surprise is not prejudicial error.

In view of the uncontested factual circumstances of this case, the first two portions of Section 4511.21, Revised Code, become so intimately interwoven that a charge of one necessarily involves a charge of the other whether specifically mentioned or not. Appellant treats assured clear distance as independent of speed; whereas it is apparent that speed is an integral factor of assured clear distance. Had the defendant been progressing at a reasonable and proper speed, he would have had time to stop before hitting John Papp. In the instant case in which the defendant hit a stationary, discernible object, the reference, a speed greater than was reasonable, automatically infers reference to that portion of the statute pertaining to the necessity of bringing a car to a halt before hitting such an object.

Thus the reference to excessive speed in the Bill of Particulars was sufficiently generalized so as not to significantly narrow the indictment and therefore not preclude a charge on assured clear distance. No error having been shown, the case is affirmed.

WASSERMAN, C.J., CORRIGAN, J., ARTL, J. concur.

MANDATE OF THE SUPREME COURT OF OHIO.

(March 12, 1969.)

To the Honorable Common Pleas Court
Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

OHIO REVISED CODE.

Section 4511.18—Manslaughter in second degree.

No person shall unlawfully and unintentionally kill another while violating any law of this state applying to the use or regulation of traffic. Any person violating this section is guilty of manslaughter in the second degree.

Section 4511.21—Speed limits; modifications.

No person shall operate a motor vehicle, trackless trolley, or streetcar in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no per-

son shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

Section 2941.07—Forms in charging offenses.

The following forms may be used in charging offenses: * * * Manslaughter. A.B. unlawfully killed C.D. * * *. Forms authorized by other sections of the Revised Code and other brief and comprehensive forms applicable to other offenses may also be used. The prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

INDICTMENT.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

Of the term of April, in the year of our Lord one thousand nine hundred and sixty six.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio,

Do Find and Present, That Robert E. Boenker on or about the 18th day of February, 1966, at the County aforesaid, unlawfully and unintentionally killed John Perry Papp while engaged in the violation of a State Law applying to the use and regulations of traffic on, over or across the roads or highways.

Revised Code 4511.20
Revised Code 4511.21
Revised Code 4511.46

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ JOHN T. CORRIGAN,
Prosecuting Attorney.

MOTION TO FURNISH BILL OF PARTICULARS.

Now comes the defendant and respectfully moves this Honorable Court for an order requiring the Prosecuting Attorney of Cuyahoga County, Ohio to furnish a Bill of Particulars setting up specifically the nature of the offense charged for the reasons set forth in the Brief attached hereto, made a part hereof and marked Exhibit "A."

/s/ HARVEY H. STARKOFF,
Attorney for Defendant.

JOURNAL ENTRY.

(Filed June 14, 1966.)

Defendant's Motion for Bill of Particulars, is granted by the Court.

/s/ THOMAS J. PARRINO,
Judge.

BILL OF PARTICULARS.

Responding to the request of the defendant Robert E. Boenker for a Bill of Particulars, the Prosecuting Attorney says that the State of Ohio will prove on the trial of the above entitled case, the following:

That the defendant, on or about the 18th day of February, 1966, within Cuyahoga County, unlawfully and unintentionally killed John Perry Papp while operating a motor vehicle east on Madison Avenue, at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ JOHN T. CORRIGAN,
Prosecuting Attorney.

MOTION FOR MORE COMPLETE BILL OF PARTICULARS.

Now comes the defendant and respectfully moves this Honorable Court for an order requiring the Prosecuting Attorney of Cuyahoga County, Ohio to furnish a more detailed and complete Bill of Particulars setting up more specifically the exact nature of the offense charged for the reasons set forth in the Brief attached hereto, made a part hereof, and marked Exhibit "A."

/s/ HARVEY H. STARKOFF,
Attorney for Defendant.

JOURNAL ENTRY.

Defendant's Motion for More Complete Bill of Particulars, is granted by the Court.

/s/ THOMAS J. PARRINO,
Judge.

AMENDED BILL OF PARTICULARS.

Responding to the request of the defendant for a more detailed Bill of Particulars, the Prosecuting Attorney says that the State of Ohio will prove on the trial of the above entitled case, the following:

That the defendant, on or about the 18th day of February, 1966, within Cuyahoga County, unlawfully and unintentionally killed John Perry Papp while operating a motor vehicle east on Madison Avenue at the intersection of Magee Street, at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

The Prosecuting Attorney says further that the allegation with reference to speed is a matter of evidence to be established under all the facts and circumstances which will be offered by the State on the trial of this case.

/s/ JOHN T. CORRIGAN,
Prosecuting Attorney.

MOTION FOR MORE COMPLETE BILL OF PARTICULARS.

Now comes the defendant and respectfully moves this Honorable Court for an order requiring the Prosecuting Attorney of Cuyahoga County, Ohio to furnish a more detailed and complete Bill of Particulars setting forth more specifically the rate of speed at which the defendant was allegedly operating his motor vehicle at the time of the alleged crime, the direction in which John Perry Papp was traveling at the time of the alleged crime and in what crosswalk he was in at said time for the reasons set forth in the Brief attached hereto, made a part hereof and marked Exhibit "A."

/s/ HARVEY H. STARKOFF,
Attorney for Defendant.

JOURNAL ENTRY.

(Filed September 22, 1966.)

This cause came to court this day for consideration of defendant's Motion for a more complete Bill of Particulars, and the same is overruled by the Court.

/s/ ROY F. MCMAHON,
Judge.

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vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed with a Memorandum to Lawyers in their case No. 28748. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED.

The "Questions Presented" in the petition do not accurately present questions raised by the record and by the opinion and judgment of the Court of Appeals. Respondent submits that the subject matter of petitioner's questions would be more properly stated as follows:

I. In the circumstances of this case, was the statement written out by the petitioner in answer to a general inquiry by the police officer at the scene of a traffic accident as to what happened obtained in violation of the constitutional rights guaranteed by the Fifth Amendment to the United States Constitution?

II. Was the trial court's charge on the Ohio assured clear distance rule violative of the petitioner's right to be informed of the nature and cause of the accusation as guaranteed by the Sixth Amendment of the United States Constitution?

STATEMENT OF THE CASE.

Robert E. Boenker was indicted for manslaughter in a second degree (traffic manslaughter) under Ohio Revised Code Section 4511.18 which provides:

> "No person shall unlawfully and unintentionally kill another while violating any law of this state applying to the use or regulation of traffic, Any person violating this section is guilty of manslaughter in the second degree."

The indictment specified that the defendant violated Ohio Revised Code Section 4511.21 which provides:

> "No person shall operate a motor vehicle, trackless trolley, or streetcar in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and

width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

State's Evidence.

At the commencement of the trial it was stipulated that the victim, John Papp, age 6, died as the result of an automobile-pedestrian accident at Magee and Madison Avenue, in Lakewood, Ohio, at 6:30 p.m. February 18, 1966. The automobile that struck John Papp was a 1963 Chevrolet convertible, driven by the defendant, Robert Boenker.

At the point of the accident Magee Avenue extends south from Madison Avenue, which is 44 feet wide at this point. Almost directly across Madison from the westerly curb of Magee is the easterly curb of Winchester Avenue, which extends north from Madison. About one block west Lark Avenue runs into Madison and there is a traffic light at this intersection. This section of Madison Avenue is a business area. At the time in question there were traffic signs posted showing a 25 miles-per-hour speed limit for vehicles on Madison. The center line of Madison was indicated by a crack in the paving. There was a manhole cover on Madison, just north of the center, almost opposite the east curb of Magee.

On the evening of February 18, 1966 at 6:30 the streets were dry. It was a clear night at about dusk. The street lights were turned on, one light being on the northeast corner of Winchester. There were lighted stores along Madison in the area of the intersection, one being at the corner of Madison and Winchester.

The Potomic family, consisting of the parents, son Dennis, 22, and a daughter, 19, had crossed Madison from the northeast corner of Winchester to their car parked on the south side of Madison just west of the southwest corner of Magee. As Dennis turned right to go to his car he noticed a little boy to his left standing in the street about four or five feet off the curb. Dennis testified:

> "A. When I noticed his jerky movements as if to go across the street, I turned and walked over to him and asked him if he wanted to cross the street, if he was going to cross the street and he said yes and I extended my arm to reach down towards him.
>
> * * *
>
> A. Yes; he took my hand with his left hand and reached up.
>
> * * *
>
> A. Since I had just completed crossing the street from the opposite direction, there was no traffic at that time. There still was no traffic as I turned around to the little boy."

Dennis remembered that there were no oncoming cars in the block between Magee Avenue and Lark to the west where the traffic light was. After he looked to see if there was any traffic, the following occurred (R. 104-105):

> "I proceeded to cross the street with the little boy, and as I approached the middle of the street looking still both ways, I noticed a car coming from the east, so I walked to the center of the street, tried to position myself on the center of the street. I reached the center of the street and there still was no traffic coming from the west area within that block. As I reached the center of the street, we stopped and I concentrated my eyes on the traffic coming from the east."

Dennis saw only one car coming from the east and stopped dead in his tracks. The car was coming at what

he thought was a normal rate of speed. He waited about five seconds for that car to get by. He was positioned in the direct center of the street. The little boy was on his right or east side. Asked what happened then, he said (R. 106):

> "I don't remember the car that struck me. All I remember is watching the car that came from the east, being that that was the car I had to get by in order to complete crossing the street, and I don't remember anything else."

Dennis was taken to Lakewood Hospital. He remained there 33 days.

Dennis Potonic's father, who was standing in the street about two steps from the curb, watched his son stop, talk to the little boy, take the boy's hand, walk to the center of Madison and stop there waiting for the westbound traffic to clear. Mr. Potonic then turned to walk to his car. He saw lights of a car facing east near the traffic light at Lark, one block west of where his son Dennis was standing. The lights seemed to be pointed higher than he thought they should. There was no other traffic between the place where his son and the little boy were standing and the traffic light at Lark. After he had taken perhaps three steps he heard a thud. He looked for his son and found him lying back of a Volkswagen that was facing west, about the length of the Volkswagen from where he had been standing. Looking up the street Mr. Potonic saw what looked like a jacket or coat lying in the street, about four car lengths farther east. He saw a pair of little sneakers where his son was. There was a car stopped east of where the little boy was lying. The police arrived in two or three minutes.

The driver of the westbound Volkswagen was Paul Landolfo, a teacher, who lived on Madison Avenue and

was on his way home at the time. He was approximately at the intersection one block east of Winchester when he first saw the pedestrians standing in the center of Madison. There was no eastbound traffic between him and the Lark Avenue traffic light, which was red. He described what happened then (R. 211-212):

> "I saw them standing there, and as I approached, as I came within the block towards them, I noticed that the one boy was a small boy I began to slow down. I don't know why, except I thought maybe the young boy might dart out in front of the car or something, but I began to slow down which left, by the time I got to the scene of the accident, quite a big space between myself and the cars which were ahead of me which had already begun to speed up because the light had changed green, and as I approached * * *"
>
> * * *
>
> "The cars ahead of me began to speed up and I slowed down. I don't think I was going more than 15, possibly 10 or 15."

As Mr. Landolfo approached the pedestrians he saw an eastbound car which was over too far at the center of the street. The car seemed to be accelerating. The headlights were tilted up as happens when a car accelerates. Mr. Landolfo saw where the pedestrians were standing and the way the car was coming and he knew if the car continued in this path it would hit the pedestrians. He described what happened as the car proceeded east (R. 213-214):

> "It hit the pedestrians who were standing in the middle of the street.
>
> "At this time, I was almost upon them, being almost right next to them, and the older boy then was thrown diagonally into the front of my car, not

actually the front itself, actually, in the side, more the side than the front, and the younger boy I didn't see until after I had gone and called the police."

* * *

"Well, I would say the tire of the car was just probably on it (centerline) or very close to it, leaving the bumper and so forth hanging over that line."

Mr. Landolfo called the police. When he got out of his car he saw the older boy lying approximately two feet behind his car. While he was standing in the street waiting for the police he saw what looked like a pile of clothes in the road about 80 feet to the east in the east lane close to the center. He saw the car that hit the pedestrians stopped down the road. It was a 1963 Chevrolet convertible. Mr. Landolfo described the weather condition as very good, almost like a summer night except it was just chilly. The streets were dry, and clear.

The 1963 Chevrolet convertible in question was observed by Mrs. Linda Alberino, who was driving east on Madison after picking up a passenger, about two miles farther west. Mrs. Alberino first noticed the 1963 Chevrolet proceeding east at the traffic light at Bunts Road and Madison Avenue. She noticed also that each time after both cars were stopped for a red light and started up again the Chevrolet car the defendant was driving was soon almost a block ahead of her, although she was driving at the 25-mile limit posted on the signs. Both cars stopped for the light at Madison and Lark, the defendant's car ahead of Mrs. Alberino. When they started up, she had not reached the middle of the block by the time he had reached Magee. When she reached Magee she saw there had been an accident. The Chevrolet was farther east on Madison in the center of the right-hand lane. She saw a body behind the Chevrolet and another body lying in the center of Madison by a Volkswagen.

The Lakewood police officer dispatched to the scene at 6:37 p.m. was John L. Javor, whose assignment was accident investigator. When he arrived he saw two bodies lying in the street in these locations (R. 257):

> "The older pedestrian, Potonic, Potonic's body was lying at the intersection of Magee and Madison. His body was 1 foot north of the manhole cover, and at at the time I noticed a Volkswagen had been stopped approximately 8 feet west of the body and then I also noticed a body lying in the center of the center line approximately 84 feet east of this manhole cover, and I also noticed a 1963 Chevrolet convertible, maroon color, that was east of this body lying in the center of the street, and this car, the rear of this car, was stopped 108 feet east of the manhole cover."

Robert Boenker, the defendant, told the officer he was the driver of the car that was stopped east of the manhole cover, stating (R. 259):

> "Well, at the time he stated that he was the driver of the Chevrolet, he also stated that he was near the center line going east on Madison, about 35 miles an hour, and he also, when he approached Magee, about 2 car lengths away he noticed a 1957 blue Oldsmobile that made a half turn into Magee and back into Madison. His eyes were turned towards that car that made that half turn and then he heard a thud and glass breaking and something flying off to his left, and when he stopped the car, he was 108 feet east of the manhole cover."

Ten or fifteen minutes later, after assisting the ambulance and inquiring if anyone saw the accident, the officer talked to Boenker again, outside the police cruiser and asked Boenker if he cared to write down what he had said. Boenker agreed and sat in the cruiser while he wrote out and signed a statement (St. Ex. 2) (R. 265-266). Mr. Landolfo was in the cruiser at the same time writing out

a statement. After Boenker wrote out the statement the officer told him he was free to go and Boenker left.

The spot where the small boy's body was lying on the center line of Madison was 84 feet from the edge of the manhole cover, which was 8 feet east of the Volkswagen. The Chevrolet was stopped 108 feet from the manhole cover. The left front headlight of the Chevrolet was damaged. The officer found a piece of cloth about two or three inches long embedded in the chrome strip of the headlight area. The officer looked for skid marks, because if he was going 35 miles an hour and came to a stop, as he said, he should have applied his brakes. The officer did not find any skid marks. He described the area as a business district with stores and banks on Madison. A traffic sign for 25 miles per hour is posted for eastbound traffic approximately one-tenth of a mile west of where the accident took place.

Defense Evidence.

The petitioner, who worked in the supermarket operated by his parents several blocks from the scene of the accident, said he was on his way to the store from his home in Rocky River (west of Lakewood) to pick up some groceries. His account of the accident was that after he passed the light at Lark Avenue and Madison a car in front of him made a turn into Magee Avenue and then turned back out again onto Madison. The petitioner heard a thump and glass breaking. He did not slam on his brakes but stopped normally in the eastbound traffic lane opposite the point where the next street east runs into Madison. He said he was looking at the car that had turned out in front of his when he heard the thump. Looking in the mirror he saw a body lying in the street and ran back then called the police from a real estate office.

When the police arrived the petitioner said he told officer Javor he was the driver of the car. He was asked for his driver's license and gave it to the officer, who retained it. When the officer asked him what happened the petitioner told him about the car in front of him. He told the officer he was going 35 miles an hour because he "had heard other people say it." He did not know how fast he was going. He told the officer that when he heard the thump he thought his car and another car had sideswiped, after which the officer asked him to wait in the cruiser so he wouldn't get hit. "Traffic was starting up again and it was starting to go through the intersection and I was standing on the street." He did not wait in the cruiser long prior to writing out the statement.

The petitioner said that after he started writing the statement, he asked the officer if he could call his parents. The officer said it was important to get the statement down, get the facts while "they're still fresh in my mind." When questioned as to why he crossed out certain words, the petitioner said the officer told him to "be specific. He wanted to get every fact in there." (R. 393)

The petitioner was questioned by his counsel concerning the contents of the statement. He said that the statements, "I was watching the car that pulled out of Magee and I didn't see the people in the street." "The reason I stopped was because I heard the thump of the people off of my car." "And I realized that I had hit someone," were not correct; he stopped because he thought he sideswiped another car. He said he first realized that he hit someone after he looked back in his rear view mirror.

On cross-examination the petitioner admitted he was familiar with the posted speed in the area; there were signs posted on Madison Avenue saying 25 miles per hour.

He admitted having told the police he was going 35 miles an hour. The police officer did not tell him to say that, but he mentioned that figure because someone else had given him that idea. He really didn't know how fast he was going. He said there was no car ahead of him when he was waiting for the light at Lark and Madison. He saw the car he said was up ahead when he started up. He did not see anything in the middle of the street. He wasn't looking directly in the middle of the street. (R. 409) He didn't see what he hit because he wasn't looking at that point when he hit something. He didn't see the pedestrians at all.

LAW AND ARGUMENT.

1. The State's evidence in this case includes testimony by the officer at the scene as to what the petitioner said when the officer asked him what had happened and the statement (St. Ex. 2) the petitioner wrote out in the police cruiser a few moments afterwards. Before trial commenced the court conducted a hearing on a motion to suppress all oral or written statements by the petitioner to the police. At the conclusion of the hearing and arguments of counsel the court overruled the motion as to the oral and written statements made at the scene, stating (R. 63-64):

> "The Court: Let me say on behalf of the Lakewood police, there is no question in my mind this statement was voluntary, at least in the mind of the court, and certainly under the law as it was known to the police at the time of the accident, the statement was admissible.
>
> The police methods that were used under the law as they knew it at that time were not only proper, but in the opinion of the court, they were highly commendable; however, the law of Miranda does apply to this case.

> It is the opinion of the court that the oral statement made on Friday, that is the 18th * * * and the written statement made on Friday, the 18th, are both admissible in evidence, as being outside the scope of the effect of the Miranda decision. These statements come within the lawful and admissible scope and field of interrogation.
>
> However, as to the written statement made on Saturday, the 19th, the situation is otherwise; the court feels that the fundamental thrusts of the Miranda decision is directed toward stationhouse interrogation and that, therefore, the statement taken at the stationhouse in absence of the warnings required by the Miranda case are not, or is not admissible in evidence."

The thrust of the defense argument is that what the petitioner said to the officer and wrote out in the cruiser constituted in-custody interrogation without the constitutional warnings required by the *Miranda* decision (*Miranda v. Arizona,* 384 U. S. 436). The testimony on the motion disclosed:

Lakewood City Patrolman John L. Javor arrived at the scene to investigate a traffic accident. The petitioner, Robert Boenker, came up to him and said he was the driver of the car that was involved in the accident. The officer asked for and took his driver's license. Patrolman Javor asked Boenker to stand by until he saw that the injured persons who were still alive were taken care of. (R. 37, 57) "He told me to get out of the street so I wouldn't get hit." (R. 14) The officer went back to Boenker after the injured had been removed, asked what happened and inquired about the direction he had been traveling. Boenker orally related what happened. After hearing Boenker's answer, the officer asked him if he cared to write a statement and if he agreed, to sit in the police car and write it. (R. 38) Other witnesses were also in the police car writing out statements. (R. 51-52)

Officer Javor did not tell Boenker what to say, he was asking what happened. Boenker said he wrote "What I thought was a complete detailed description and he told me, well, to be specific on certain points." Boenker told him as best he could at that time what had happened. Robert Boenker said he was in the police car "about 20 minutes, maybe half an hour" (R. 15); after he completed the statement Robert Boenker was sent home.

The testimony at the hearing on the motion revealed that the day after the accident the police officer came to the market where Boenker was working and asked him to come to the station and clarify some matters in his statement that he wrote out soon after the accident. The petitioner said he could not leave his work but would come afterward, to which the officer assented. The officer told the petitioner's father he could come along. Later that afternoon in the presence of his father Boenker made a statement to another officer at the police station. The trial court excluded this statement because of absence of the *Miranda* warnings. However, the petitioner was not placed in custody and was sent home after this statement. He testified that the police did not tell him he was under arrest at that time and in fact he was not under arrest. He and his father left the station together (R. 20). The Papp boy died February 23rd. The petitioner was arrested March 2nd.

The defense argument seeks to bring the statement the petitioner wrote out in the police cruiser within the *Miranda* rule, as constituting the custodial interrogation defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action." There is not one scintilla of evidence in this case showing any intent to take Boenker into custody. He was merely asked to wait in the cruiser, out of the way of the traffic on the street,

for a short time until the officer had taken care of the injured, and then to write down his account of the accident. This he agreed to do and this he did. Wherein was he deprived of any freedom of action? Wherein was he under restraint? Wherein was the police car "secluded"? Proof that none of these claims has any foundation appears in the petitioner's own testimony (R. 14, 15, 16) under cross-examination:

"Q. Well, how did the police happen to come up to you?

A. They didn't. I came—I went up to the officer and I told him I was driving the car and they said, 'Well, just stay at the side a minute.'

They had to get the injured people out of there.

Q. Sir, you went up to the officer and told him that you were driving the car, and they told you to step aside for a minute, is that correct?

A. Well, he told me—he told me to get out of the street so I wouldn't get hit.

Q. And at that time, did he tell you to go sit in the police car?

A. No; not right away.

Q. Well, in a few minutes later, did he come back to you and say 'Maybe you better sit in the police car'?

A. No, sir.

Q. Well, at any time, did other people come to the police car and sit in the police car?

A. Yes, sir.

Q. And there were other people there who were driving other cars that stopped in the street that came and sat in the police car, too, is that right?

A. Yes, sir.

Q. And the officer was there asking both you and these other people what happened, isn't that right?

A. Yes, sir.

Q. And he was getting, as best he could, written observations from both yourself and some of these other parties, is that right?

A. Yes, sir.

Q. How long were you in the police car?

A. About 20 minutes, maybe half an hour.

Q. Twenty, 25 minutes, maybe a half an hour; all right. And it was this officer right here, wasn't it?

A. Yes, sir.

Q. And after you were there that period of time, you went home, on your way, didn't you?

A. Yes, sir.

* * *

Q. —Officer Javor didn't tell you what to say, did he?

A. No, sir, he didn't.

Q. He was asking you what happened, isn't that right?

Q. Yes, sir. I wrote what I thought was a complete detailed description and he told me, well, to be specific on certain points.

Q. And you told him as best you could at that time what had happened, is that right?

A. Yes, sir.

Q. And, of course, what you told him then and there was the truth as you thought at that time, is that right?

A. Yes.

Q. He didn't force you to say anything at that time, did he?

A. No, he didn't."

The defense infers that when the officer took the petitioner's driver license he was not free to depart. There is no evidence to support this conclusion. True, he could not drive his car away, but we must remember that the officer was investigating a traffic accident in which two pedestrians were seriously injured and the presence of the car was necessary to their investigation. Likewise, the officer's request that the petitioner finish the report while the facts were fresh in his mind before trying to telephone

his parents was only reasonable and certainly not evidence of any coercion.

The defense has not cited any decisions holding that evidence of on-the-scene questioning in a situation comparable is barred by the *Miranda* rule. The subject has, however, been considered by the courts. In *State v. Lief*, 234 A. 2d 124 (Conn.), a police officer sent to investigate an accident found a fence down and a car off the road. The officer asked "What happened?" and the defendant told him about a coke bottle * * *. The court held that *Miranda* would not apply to such questioning; that such a situation would be a general-on-the-scene questioning setting under *Miranda* and the prospective defendant would not be under restraint or in "custody."

In *Jones v. State*, 234 A. 2d 900 (Md.), the defendant was identified by eye-witnesses as the man who had shot another person at a dance hall altercation and the police began a search for him. They found him sitting in his car with his girl friend and a police officer asked him whether he had been at the dance hall where the shooting had occurred. This was held not to be "custody" within the meaning of *Miranda*, but rather a mere "accosting" not amounting to a significant deprivation of freedom.

In *Duffy v. State*, 243 Md. 425, 221 A. 2d 653, a policeman entered a bedroom where the defendant was sleeping, and seeing a knife the officer asked "Is this the knife you used in the fight?" The Maryland court held this was an accosting and did not amount to custodial interrogation.

Contrary to the defense claim, there is no evidence in this case which came about as the result of compelling pressures which worked to undermine Robert Boenker's will to resist and to compel him where he would otherwise not do so freely or to submit to interrogation de-

signed to elicit an incriminating statement. Rather, the conclusion is inescapable that Boenker was under no compulsion or custody whatever; that he willingly wrote out the statement after being asked if he cared to do so. As the trial court stated, the police methods used were highly commendable and the statements come within the lawful and admissible scope and field of interrogation. (R. 63.)

See *State v. Perry*, 14 Ohio St. 2d 256.

2. The petitioner complains that the State was permitted to go outside the indictment and bill of particulars to establish a violation of the Ohio assured clear distance rules. The specifications alleged in the amended bill of particulars are as follows:

> "That the defendant, on or about the 18th day of February, 1966, within Cuyahoga County, unlawfully and unintentionally killed John Perry Papp while operating a motor vehicle east on Madison Avenue at the intersection of Magee Street, at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk * * *"

The portion of Revised Code 4511.21 that was specified in the indictment and upon which the charge in this case was based is:

> "No person shall operate a motor vehicle * * * upon the streets * * * at a speed greater * * * than is reasonable or proper, having due regard to the traffic, surface and width of the street * * * and any other conditions and no person shall drive any motor vehicle * * * in and upon any street * * * at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

The question, then, is did the indictment and amended bill of particulars serve to inform this petitioner that he

would be required to meet the assured clear distance issue portion of the statute and justify the court's charging the jury on this subject? We submit that it did. The allegation, "without due regard for the safety and rights of John Perry Papp, who was lawfully crossing said roadway within a crosswalk" taken in conjunction with the allegation of speed greater than was reasonable or proper sufficiently informed the accused that he would be required to meet the issue that he was driving so fast that he could not see what he should have seen in time to stop and thereby avoid hitting the pedestrians.

The disjunctive "or" followed by these words "without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk" served to inform the defendant that the State intended to prove that he did not have his car under control so that he could stop it within the assured clear distance ahead.

The Court of Appeals in a Memorandum to Lawyers considered the propriety of the court's charge stating:

> "While in the instant case it is apparent that the defense counsel was surprised by and unprepared for Judge Whiting's charge on the assured clear distance ahead portion of the statute (R. 455), it also is clear that such surprise is not prejudicial error.
>
> In view of the uncontested factual circumstances of this case, the first two portions of Section 4511.21, Revised Code, become so intimately interwoven that a charge of one necessarily involves a charge of the other whether specifically mentioned or not. Appellant treats assured clear distance as independent of speed; whereas it is apparent that speed is an integral factor of assured clear distance. Had the defendant been progressing at a reasonable and proper speed, he would have had time to stop before hitting John Papp. In the instant case in which the defendant hit

a stationary, discernible object, the reference, a speed greater than was reasonable, automatically infers reference to that portion of the statute pertaining to the necessity of bringing a car to a halt before hitting such an object.

Thus the reference to excessive speed in the Bill of Particulars was sufficiently generalized so as not to significantly narrow the indictment and therefore not preclude a charge on assured clear distance. No error having been shown, the case is affirmed."

The petitioner had a fair trial before a fair and impartial court and jury and nowhere were any federal constitutional standards either misapprehended or misapplied. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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